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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80-736

ANDREW SPENCE
~~SPENCE & GREEN CHEMICAL COMPANY~~
Petitioner

vs.

SECURITY & EXCHANGE COMMISSION
Respondent

PETITION FOR A WRIT OF CERTIORARI

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT NEW ORLEANS, LOUISIANA

ANDREW SPENCE

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Crosby, Texas 77532
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Citizen Petitioner

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Petitioner, Andrew Spence, ~~and Spence and Green Chemical Company~~ prays that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals the Fifth Circuit, New Orleans, entered in this case on February 20, 1980, Nos. 76-4017, 77-1362 77-3173, 77-2600.

Andrew Spence is a citizen petitioner, not a lawyer.

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(a) Questions Presented

I

Whether the Court erred in appointing a temporary receiver upon a small corporation where there were no creditors complaining, no request for reorganization and no allegations proven, only as the result of economic duress inflicted by the Securities and ExchangeCommission.?

II

Whether the Court can deprive the right to trial for four years through a series of hearings, deny discovery and and interrogatives and then order Summary Judgment?

III

Whether a temporary receiver has authority to sign a Consent decree of permanent injunction for a corporation whose officers and directors control the majority of of the shares of the Corporation.?

IV

Whether a temporary receiver has authority to settle a V amendment suit against those who stole company money?

V

Whether the judicical system is corupted by a receiver and attorney preparing an order which read,

"After hearing the testimony of witnesses",

when there were no witnesses, the order signed and order becomes part of docket proceedings?

VI

Whether the statement in the order dated February 7, 1975, "The agreement by and between Trumbull Asphalt and Receiver whereby funds and expenses by Trumbull Asphalt Company.... to be an advance against royalties", is completely false? Appendix, advance royalty agreement September 21, 1973 made eight (8) months before appointment of receiver.

VII

Whether Judge Reavley has any certified authoritative reference showing the Permanent suspensions of the Regulation A Form 1-A?

VIII

Whether the exemption was in effect on October 31, 1972?

IX

Whether the S.E.C. ever permanantly suspended the Form 1-A Regulation A exemption?

X

Whether the S.E.C. has ever named a specific Sale of Securities which is in violation of the Federal Securities Act of 1933?

XI

Whether there are any constitutional provisions, in the Constitution of the United States of America, for economic coercian authorizing threat of long and costly litigation, inflicting of unusual punishment?

XII

Whether the Court denied the right of free speech in the hearing of January 27, 1975?

XIII

Whether Judge Bue used the convenience of his office, when Spence tried to inject into the record, the break in of Pinson (the receiver) and Randle Henderson (S.E.C.) into Spence and Green Office in a building owned by Spence and partially used by Spence and Green? then in anger said,

> "no officer, director, stockholder or anyone other than the Court appointed receiver would have any say in the management of the Spence and Green Chemical Company affairs."

XIV

Whether Judge Bue used the convenience of his court to deny Spence his right to speak, so that Spence could put the actions of the Court in proper perspective?

XV

Whether the threat of long and costly litigation at the start of the case by members of the Security and Exchange Commission and the implementation of that threat by six years of hearings is an indication of control of the court by the S.E.C.?

XVI

Whether six years of hearings are nore legal than double jeopardy?

XVII

Whether Judge Reavley can show that attorney Frank Penedo ever handed or mailed Andrew spence a finished corrected copy of the letter for disclosure to the accounting firm?

XVIII

Whether the original accounting firm incompetency is brought to light by auditor J. L . Hood report of September 9, 1975, denied to be put in record by Judge Bue?

XVIV

Whether time had proven Andrew Spence opinion in potential liability as the correct opinion?

XX

Whether Judge Reavley erred in overlooking Andrew Spence correct opinion of the liability?

XXI

Whether a copy of a letter to S.E.C. showing the problems Andrew Spence was having with the S.E.C. can be considered advertising for sale of stock?

XXII

Whether the subscription blanks still in their original package could have been mailed with the offering circular on October 31, 1972?

XXIII

Whether S.E.C. attorney East had any authority to question the $2.50 price of the offering, violating the rules of the Regulation A Form 1-A Offering?

XXIV

Whether an occurrence on or before July 16, 1973 can be a violation of the preliminary injunction dated August 29, 1973?

XXV

Whether Judge Reavley can certify from the record that the letter date of March 20, 1973 was mailed to all Spence and Green shareholders?

XXVI

Whether Judge Reavley erred in stating, "Spence was entitled to no exemption for these two transactions." the Regulation A was in effect at the time of this sale, both parties were knowledgeable and financially sound private placements and both parties agreed to allow the company to hold the stock in the company safe until our problems were cleared up? — No complaint after 7 years.

XXVII

Whether Judge Carl O. Bue demonstrated a bias against Spence and Green Chemical and Andrew Spence in denying interrogitive, discovery and all motions?

XXVIII

Whether a small company whose stock had traded over the counter for twelve years, - through no effort of its officers or directors, - is required to be selective in mailings?

XXIX

Whether the forty five minute meeting in Judge Bue Chamber on January 27, 1975 by the conspirators, Zbranek, Pinson, Walker and Henderson was a preparation to cover up the receiver's threat to kick in the door, of building owned by Spence, - to remove technical records to the plant that had been foreclosed on?- and then lied in court he was after the corporate minute books.

XXX

Whether the five conspirators efforts to put Spence and Green out of business has so confused the record by delays and misrepresentations that proper judgment is almost impossible?

XXXI

Whether Judge Bue abandoned his responsibility to protect Spence and Green assets during his custody, allowing foreclosure on land (33 acres) and buildings worth $400,000.00 for $57,000.00 which Axelrod the purchaser, whom the Judge said we will scare Axelrod he does business with the court?

XXXII

Whether Judge Bue abandoned his responsibility to protect Spence and Green assets during his custody allowing the dissapation and by allowing settlement of the bank suit?

(h) CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Articles I, IV, V, and VIII Amendments to the United States Constitution, Securities Act State of Texas, and Federal Securities Act of 1933, as in effect December 1, 1972.

Texas Securities Act
State of Texas

Section 5 - Exempt Transactions

Except as hereinafter in this Act specifically provided, the provisions of this Act shall not apply to the sale of any security when made in any of the following transactions and under any of the following conditions, and the company or person engaged therein shall not be deemed a dealer within the meaning of this Act: that is to say, the provisions of this Act shall not apply to any sale, offer for sale solicitation, subscription, dealing or delivery of any security under any of the following transactions or conditions:

E. Any offer and any transaction pursuant to any offer by the issuer of its securities to its existing security holders (including persons who at the time of the transaction are holders of convertible securities or nontransferable warrants) if no commission or other remuneration (other than a standby commission) is paid or given directly or indirectly for soliciting any security holder in this state.

(b) Parties to the Proceedings

Fifth Circuit Court of Appeals Judgement of February 27, 1980.
Honorable Judges, Morgan, Reavley, and Hatchett Julia Allecta, Security and Exchange Commission, Lynn N. Hughes, Amicus Curiae, Lawerence Cohen, attorney for Spence and Green Chemical Company and Andrew Spence.

District Court, Houston Division order of February 7, 1975.
Honorable Judge Carl O. Bue,
Pinson, Temporary receiver
William Walker, Security and Exchange Commission
Randle Henderson, Security and Exchange Commission
J. C. Zbranek, Attorney for Spence and Green Chemical Company.

(e) Jurisdiction

(e)(i) The Judgment sought to be renewed was dated and entered February 27, 1980.

(e)(ii) The order sought to be renewed was dated and entered February 7, 1975. Order extending time to October 5, 1980, Dated July 17, 1980.

(e)(iv) The court has jurisdiction under Amendments to the United States Constitution:

Article I
Article IV
Article V
Article VIII

(g) CONCISE STATEMENT OF THE CASE

The case started as an allegation of selling unregistered stock. Through three and one-half years of hearings has become a case of property rights.

The conspirators; Sims, Walker, Henderson, of the Securities and Exchange Commission, Zbranek, attorney for Spence and Green Chemical Co. and Pinson, dissipated the assets of corporation to accomplish Sims original threat of putting Spence and Green Chemical Company out of business.

This case revolves around the premise that Andrew Spence and Spence and Green Chemical Co.:

(1) Offered securitries in violation of the Securities Act of 1933.

At no time since the acceptance by the S.E.C. of the Regulation A Form 1-A application has there been an offer which wouldn't be included in Spence and Green Regulation A exemption filed on September 14, 1972, in effect September 24, 1972 and terminating September 14, 1973. The ten day trading suspension of January 11, 1973 was self-terminating

See Attestation Appendix.

(2) Sold unregistered securities in violation of the Securities Act of 1933.

In 8 years the S.E.C. or no member thereof has named a specific sale requiring registration.

At the hearing of 8/29/73, after hearing the explanation of exhibit IV, which is now missing from the records, Judge Bue in open court stated,

"There is no fraud here."

Exhibit IV was withdrawn by Joe Bob Foster, photo reduced, returned and then disappeared from the proceeding file. Exhibit IV has been reconstituted and certified. James L. Hood, auditor, verifies the original numbers of exhibit IV. appendix.

This case is repleted with reference to James I. Farmer having accepted a consent agreement. Farmer signed the consent degree under threat — coercion. Farmer's affidavit appendix.

The record and order of the February 7, 1975 hearing is the final exemplification of the case. The character of the Judge,

Zbranek, Pinson and S.E.C. participants are exposed also the case.

The case is also defined by the Amicus Curiae April 11, 1978,

"The planitiff, Securities and Exchange Commission, filed a complaint against the defendants on July 16,1973, which was based on alleged violations of the Securities Act of 1933, (Tr. p. 1), and on July 17, 1973, the Commission applied for a temporary receiver of the Spence & Green Chemical Company (Tr. p. 17)

The Commission reapplied for the receivership on January 28, 1974, (Tr. p. 22) and Mr. Theo H. Pinson was appointed by the court on May 24, 1974 (Tr. p. 60).

Despite a motion to terminate the receivership,filed onJuly 1, 1976, (Tr. p. 64) the court declined to rule on them and held them in abeyance pending this appeal in order of August 17, 1977, (Tr. 0035)."

Zbranek was summarily fired at end of 1/27/75 hearing. Affidavit of Dan Hayden records the conservation.

The appendix shows the perfidy of the receiver and the vacillation of the Judge.

Jerry Von Sternberg has stated to Spence that he has the notes of the hearing of 1/27/75 but that it would be several weeks before he could get around to typing them. Jerry Von Sternberg - Court reporter.

The foregoing represents the citizen opinion of the case. In separate file the proper legal description is given in the Amicus Curiae Brief.

CONCLUSION

For the reason that for two and a half years we received no representation from our attorney who allowed the company to be violated, the petitioner, urges the Court of Civil Appeals Circuit, New Orleans, to reverse summarily the injunctive consent degree, and remand back to District Court under a New Judge.

Respectfully submitted,
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SECURITIES AND EXCHANGE COMMISSION
Plaintiff-Appellee,

v.

SPENCE & GREEN CHEMICAL COMPANY
and Andrew Spence, Sr., Defendants-Appellants.

Nos. 76-4017, 77-1362, 77-2600 and 77-3173.
United States Court of Appeals, Fifth Circuit.
Feb. 27, 1980

SEC commenced injunctive action against company and two of its principal shareholders alleging violations of registration and antifraud provisions of Securities Act of 1933 and of antifraud provisions of Securities Act of 1934 and regulations promulgated thereunder. Company and one principal shareholder accepted consent judgements. The United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., entered summary judgment against the remaining shareholder and enjoined defendants from further engaging in activities violating registration in antifraud provisions of federal securities laws. On appeal, the Court of Appeals, Reavley, Circuit Judge, held that: (1) given principal shareholder's past conduct, his continued flaunting of federal securities laws and SEC procedures, and shareholder's position of control over company's securities dealings, imposition of permanent injunction to preclude activities violating registration and antifraud provisions of federal securities laws was proper; (2) principal shareholder was without standing to maintain direct appeal from consent judgment entered against company, and not having been party to any other appealable order, dismissal of appeal challenging company's consent judgment was proper; and (3) although trial court's decision to hold motion to terminate receivership in abeyance did not constitute abuse of discretion, it would be suggested that trial court exercise discretion to return unconditional control of corporation to its owners.

Dismissed in part; affirmed in part.

1. Federal Civil Procedure — 2544,2553

If nonmovant fails to answer by counteraffidavits or otherwise, demonstrating specific facts showing there existed genuine issue for trial, court should enter that summary judgment which the law applied to facts presented by moving party will support; however, nonmovant may forestall summary judgment by presenting affidavits that contain specific facts explaining failure to respond by counteraffidavit demonstrating existence of genuine issue of fact and, if justified by explanation, court may then grant continuance to allow resisting party to prepare counteraffidavits. Fed. Rules Civ. Proc. Rule 56(e,f), 28 U.S.C.A.

2. Federal Civil Procedure — 2553

Because burden on party resisting summary judgment is not a heavy one, one must conclusively justify his entitlement to continuance to prepare counteraffidavits by presenting specific facts explaining inability to make substantive response and by specifically demonstrating how postponement of ruling on motion will enable him, by discovery or other means, to rebut movant's showing of absence of genuine issue of fact. Fed. Rules Civ. Proc. Rule 56(e, f), 28 U.S.C.A.

3. Federal Civil Procedure — 2553

Nonmovant may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts in order to be justified to continuance of decision on motion for summary judgment, particulary where ample time and opportunities for discovery had already lapsed. Fed. Rules Civ. Proc. Rule 56(e, f), 28 U.S.C.A.

4. Federal Civil Procedure — 2553

Determination of adequacy of nonmovant's affidavits seeking continuance of decision on motion for summary judgment, and decision whether to grant continuance rests in sound discretion of trial court. Fed. Rules Civ. Pro. Rule 56(f), 28 U.S.C.A.

5. Federal Civil Procedure — 2546

District court's denial of motion for continuance of decision on ,motion for summary judgment did not constitute an abuse of discretion. Fed. Rules Civ. Proc. Rule 56(f), 28 U.S.C.A.

6. Federal Civil Procedure — 2546

Even where nonmovant fails to make proper response, summary judgment is appropriate only to extent that movant has carried his burden, affirmatively demonstrating absence of any genuine issue of material fact and showing law to be in his favor. Fed. Rules Civ. Proc. Rule 56(e, f), 28 U.S.C.A.

7. Securities Regulation — 171, 172

Given principal shareholder's past conduct, his continued flaunting of federal securities law and SEC procedures, and his position of control over company's securities dealings, imposition of permnent injunction to preclude activities violating registration and antifraud provisions of federal securities laws was proper even though violation of antifraud provisions of Securities Exchange Act of 1934 was not shown as alleged with other proven violations of registration and antifraud provisions of Securities Act of 1933. Securities Act of 1933,§§5(a, c), 17(a) 15 U.S.C.A. §§77e(a,c), 77q(a).

8. Corporations — 560(7)

Generally, a receiver, standing in the shoes of management, holds the sole right, absent some sort of shareholder derivative action, to direct litigation of corporation with whose care he is entrusted; such right includes exclusive right to appeal from judgments adverse to corporation.

9. Corporations — 559(6)

In view of appointment of receiver for corporation, principal shareholder was without standing to maintain direct appeal challenging company's consent judgment in securities litigation.

10. Receivers — 62

Decision whether to remove receiver is like decision to appoint one, an equitable determination resting in sound discretion of district court and reviewable only for abuse of that discretion.

11. Corporations — 552

Imposition of receivership on corporation is drastic measure, the detrimental business effects of which should be carefully considered.

12. Corporations — 558

Receivership once imposed on corporation should be terminated and control returned to those who own business as soon as reason for its imposition ceases.

13. Federal Courts — 921

Although trial court's decision to hold in abeyance pending appeal a motion to terminate receivership of corporation did not constitute an abuse of discretion, suggestion was made that trial court exercise discretion to lreturn unconditional control of corporation to owners in view of condition of corporation.

Appeals from the United States District Court for the Southern District of Texas.

Before MORGAN, REAVLEY and HATCHETT, Circuit Judges.

Reavley, Circuit Judge:

Appellee Securities and Exchange Commission (SEC) commenced this injunctive action against Spence and Green Chemical Company and two ot its principal shareholders, Andrew Spence and James I. Farmer, alleging violations of registration and antifraudprovisions of the Securities Act of 1933 (sections 5(a), (c) and 17(a)), 15 U.S.C. §§77e(a), (c) and 77q(a), and of the antifraud provisions of the Securities Exchange Act of 1934 and regulations promulgated thereunder (section 10(b) and rule 10b-5), 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5. Both Farmer and the company accepted consent judgments. The district court entered summary judgment against Spence. The court enjoined each defendant from further engaging in activities violating the registration and antifraud provisions of the federal securities laws. Spence, alone, presses this consolidated appeal from four adverse rulings handed down during the course of the litigation: (1) the order of November 22, 1976, granting summary judgment against Spence individually, (2) the order of September 13, 1976. entering judgment against the company based on the consent decree executed by its court-appointed receiver, (3) the order of May 10, 1977 denying defendant's motions for recusal of the trial judge and for reconsideration of its order of summary judgment against Spence, and (4) the order of August 17, 1977, denying a renewed

motion for recusal and holding in abeyance, pending this appeal,Spence's motion to terminate the receivership. We agree with the bulk of the district court's decision and the entirety of its remedy and disposition, disagreeing only with that portion of the decision that found a violation of section 10(b) and rule 10b-5.

Andrew Spence, as founder, president, and controlling shareholder, has dominated Spence and Green Chemical Company("Spence and Green" or "company") since it incorporation in 1956. The company, located in Crosby, Texas, was formed as a research and development concern to seek methods of converting low-grade industrial byproducts into commercially marketable commodities. Its undertakings in the recent past have broadened to include development of certain innovative petroleum refining techniques. Because of its overriding emphasis on research, the company had never shown a year-end profit rom its inception to the beginning of this litigation. Despite this rather morbid financial background and the restricted and local nature of early sales of stock in the company, as of September 6, 1975, Spence and Green had issued about 1,586,000 shares of stock. Because of an active secondary market, these shares are now owned by over 800 stockholders, more than half of whom are not Texas residents.

In 1970 in order to raise capital for a particular project, Spence began preparations for the company to issue additional securities under the small offering exemption to the federal securities registration laws, 15 U.S.C. § 77c(b), and Regulation A thereunder, 17 C.F.R. §§230.251-64. Spence employed an independent accounting firm to produce certified financial statements, and he retained an attorney to furnish the accountants with an opinion as to the current legal status of the company. The attorney, after reviewing Spence Spence and Green's records, advised Spence that certain past stock transactions could constitute violations of the securities laws and that the company faced substantial potential liability on those transactions. Spence, a chemical engineer, rejected this opinion, however, and declined to disclose it to the accounting firm, instead proffering his own opinion that all was in order and that no contingent liability existed. The accounting firm did not find all to be in order with Spence and Green's financial records, however, and withdrew after fifteen months, rendering no opinion as to the financial status of the company because of the inadequacy and condusion of its records. Undaunted, Spence arranged for Farmer, a director of the company who was a certified public accountant, to prepare the financial data required for the Regulation A offering.

In the spring of 1972 Spence then filed the required documents with the Ft. Worth regional office of the SEC, indicating an intent to offer 104,250 shares at $2.50 per share according to the provisions of Regulation A. The offering circular by which the shasres would bemarketed contained the financial statements prepared by Farmer, but did not disclose by whom they had been prepared, or that he was a director of the issuer. It also failed to disclose the negative opinions rendered by Spence's attorney and by the independent accounting firm. The SEC returned this filing on July 31,1972, citing numerous deficiencies in the offering circular.

After several exchanges of correspondence with the SEC, Spence eventially withdrew the filing, but on October 31, 1972, attempted to market the shares by mail in the form of a subscription available only to Spence and Green shareholders. Accompanying the subscription offer were copies of the offering

circular previously rejected by the SEC and the series of letters exchanged between Spence and the SEC. This correspondence, received by the offerees, included one letter in which Spence had predicted that within five years the stock in question would have a "value of not $2.50 per share, but $250.00 to $400.00 per share." Though this offer ostensibly was made only to Texas shareholders, the mailing also went to seventy-five brokers located throughout the country. Following this offering, the SEC permanently suspended any Regulation A exemption for Spence and Green after an administrative hearing (the transcript of which was considered by the court below and is part of the record on appeal). Nonetheless on March 20, 1973, Spence again wrote, this time to all Spence and Green shareholders, seeking "private placement loan(s) with conversion privileges."

The SEC then filed this injunction action on July 16, 1973. After Spence indicated an intent to issue further stock options to the company's creditors in the face of a preliminary injunction that among other things, prohibited further trading of Spence and Green Stock,the district court on May 24, appointed a temporary receiver to ensure compliance with the injunction, to manage the company and to conserve its assets. On October 27, 1975, the SEC moved for summary judment against Spence and the company, defendant Farmer having accepted a consent judgment on July 27, 1973. Despite repeatedly having been directed to reply to the motion for summary judgment, Spence's only response was a motion for extension of time filed July 26, 1976. Soon thereafter, on August 27, the receiver executed a consent decree, agreeing to lthe proposed injunction against the company by admitting no violations; the court entered judgment on this decree on September 13,1976. Finally, on November 22, 1976,the district court entered summary judgment against Spence on the basis of the SEC affidavits, depositions and hearing transcripts, having received no substantive response from Spence since the SEC filing of the motion more than a year before.

Summary Judgment Against Spence

[1] Though a court ordinarily will indulge in presumption and inferences favorable to a party resisting summary judgment, where one party advances a properly supported motion for

summary judgment, Fed.R.Civ.P 56(e) expressly prohibits the resisting party from resting merely on the allegations and denials of his pleading. If he fails to answer by counter affidavits or otherwise, demonstrating specific factks showing there exists a genuine issue for trial, the court should enter that summary judgment which the law applied to the facts presented by the moving party will support. *United Steelworkers of America v. University of Alabama,* 599 F.2d 56, 61 (5th Cir. 1979). In this case despite at least two orders from the court and magistrate to answer, in over a year's time Spence filed no affidavits or memoranda to contradict the well supported SEC motion.

one may forestall the mandate of rule 56(e), however, by presenting affidavits that contain specific facts explaining the failure to respond by counter affidavits demonstrating the existence of a genuine issue of fact; if justified by this explanation, the court may then grant a continuance to allow the resisting party to prepare its counter affidavits. Fed.R.Civ.P. 56(f). After having one motion for extension of time to answer denied orally from the bench, Spence's counsel again filed a memorandum requesting an extension of time to lrespond on July 26,1976. Because the memorandum was sworn and because it attempted to justify Spence's failure to answer the SEC motion, the district court appropriately evaluated it as a rule 56(f) motion and affidavit. In the memorandum Spence's counsel made vague and conclusional claims that several unidentified conflicts appeared in the testimony contained in the hearing transcripts submitted with the SEC motion, argued that he had been allowed insufficient discovery to respond at that point, and suggested that he, as substituted counsel, had been unable to familiarize himself sufficiently with the case. He attributed the failure even to submit the affidavit of Spence himself to Spence's unrelenting involvement in the construction of a company project in Indiana. In granting summary judgment the court below rejected these contentions as not sufficiently specific and otherwise as inadequate justification for Spence's failure to respond.[1]

[2, 3] Because the burden on a party resisting summary judgment is not a heavy one, one must conclusively justify his entitlement to the shelter of rule 56(f) by presenting specific facts

explaining the inability to make a substantive response as required by rule 56(e) and by specifically demonstrating "how postponement of a ruling on the otion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Willmar Poultry Co. v Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975), *cert. denied*, 424 U.S. 915, 96 S.Ct. 1116, 47 L.Ed.2d 320 (1976). The nonmovant may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts, *Gosset v. Du-Ra-Kel Corp.* 569 F.2d 869, 873 (5th Cir. 1978), particulary where, as here, ample time and opportunities for discovery have already lapsed. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 294-99, 88 S.Ct. 1575, 1595-96, 20 L.Ed.2d 569 (1968); 10 C. Wright & Miller, Federal Practice and Procedure §2740 at 726 (1973) (rule 56(f) will not be applied to aid a nondiligent party). *See Aviation Specialties, inc. v. United Technologies Corp.* 568 F.2d 1186, 1189 (5th Cir. 1978) (continuance refused where nonmovant had failed to initiate discovery even though its action had been on file for six months).

[4, 5] The determination of the adequacy of a nonmovant's rule 56(f) affidavits and the decision whether to grant a continuance theron rests in the sound discretion of the trial court. 6 J. Moore, Federal Practice 56.24 at 56-1426-28. We hold that the district court's denial of Spence's motion in this case did constitute an abuse of that discretion. *See Donofrio v. Camp*, 152 U.S.App.D.C. 280, 283, 470 F.2d 428, 431 (D.C.Cir. 1972).

[6] Even where the nonmovant fails to make a proper response under rule 56(e) or (f), however, summary judgment is appropriate only to the extent that the movant has carried his burden, affermatively demonstrating the absence of any genuine issue of lmaterial fact and showing the law to be in his favor. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L. Ed. 2d 142 (1970). In establishing, chiefly through Spence's own admissions, the offerings of October 31, 1972, and on March 20, 1973, the SEC has met its burden to demonstrate a prima facie violation of the registration requirements of the Securities Act, section 5(a), (c)[2]—that is, that the defendent offered or sold securities as to which no registration statement was in effect and that and that interstate transportation,

communication or the mails were used in connection with that offer or sale. *SEC v. Continental Tobacco Co.*,463 F.2d 137, 155 (5th Cir. 1972)

Even though the burden then shifted to the defendant to demonstrate his entitlement to an exemption to section 5, the SEC affirmatively demonstrated that Spence was entitled to no exemption for these two transactions. *See* 6 J. Moore, Federal Practice 56.15[8] at 56-643. By establishing that the offers in each situation were mailed to brokers and stockholders who were not Texas residents the SEC foreclosed any claim to the exemption for wholly intrastate offerings 15 U.S.C. § 77c(a)(11). (11). *Capital Funds, Inc. v. SEC,* 348 F.2d 582, 586 (8th Cir. 1965) (any part of an issue offered to a nonresident disqualifies entire offering).

Similarly, neither transaction falls within the "private placement" exemption of section 4(2), 15 U.S.C. § 77d(2). *See generally, SEC v. Ralston Purina Co.,* 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1953). While also employing other factors, such as number of offerees and units offered, this court has recognized the primary factor in qualifying for this emption to be the knowledge of the offerees. *Doran v. Petroleum Management Corp.*,545 F.2d 893 904 (5th Cir. 1977) The court in Doran delineated this "knowledge" requirement as demanding that all *offerees*, not just purchasers, either (1) receive the same disclosure as would be rerived from registration or (2) enjoy realistic access, by means of some special relationship to the issuer, to that information. Id at 904-06. Obviously there was not sufficient actual disclosure to qualify either Spence and Green offering, the 1972 transaction having proceeded on a deficient Regulation A offering circular and the 1973 offer to receive loans with conversion privileges having been accompanied by even less information. Neither did the more than 300 shareholders in one instance and 800 in the other, enjoy a special relationship with the company that allowed them realistic access to the necessary information. *See SEC V. Sunbeam Gold mines Co.* 95 F.2d 699, 702 (9th Cir. 1938) (confining an offer to one's shareholders does not bring it within the private placement exemption). Thus, the grant of summary judgment for Spence's violation of the registration requirements

was justified.

That portion of the SEC motion based on violations of the antifraud provisions,section 17(a)[3] of the Securities Act and section 10(b)[4] of the Exchange Act and rule 10b-5,[5] is similarly well supported. The accompanying transcripts and affidavits delineate numerous material misrepresentations and nondisclosures clearly proscribed by the antifraud provisions-for example, Spence's prediction that the stock would soon be worth over one hundred times it offering price, *SEC v. Dolnick,* 501 F.2d 1279, 1283 (7th Cir. 1974), and his failure to disclose in the offering circular either that a Spence and Green director had prepared the financial statements, *SEC v. Senex Corp.,* 399 F.Supp. 497, 504 (E.D. Ky. 1975), *aff'd per curiam on other grounds,* 534 F.2d 1240 (6th Cir. 1976) or the unfavorable reports of the independent accountants and securities attorney, *id.* at 505.

Each of the acts substantiated by the evidence, however, related only to the October 31, 1972 offering. The SEC failed to demonstrate that any sales of stock occured pursuant to this offering, and fact Spence, in administrative hearing testimony proffered by the SEC , explicitly denied any such sales. While section 17(a) pertains to offers as well as sales, section 10(b) and rule 10b-5 apply only to acts occuring "in connection with the purchase or sale" of securities. Absent this nexus with a sale or purchase, no section 10(b) or rule 10b-5 violation can be found. Accordingly, we reject the district court's ruling that Spence violated these two provisions. Because, however, the proscriptions of section 17(a) are substantially the same as those of section 10(b) and rule 10b-5, our ruling does not undermine the injunction issued by the district court. It is amply supported by the court's ruling that Spence violated section 17(a).[6]

[7] Thus, the movant SEC having amply supported its motion and allegations, summary judgment was properly granted by the district court. Moreover, given Spence's past conduct, his continued flouting of the federal securities laws and SEC procedures, and his position of control over his company's securities dealings, we affirm the imposition of the permanent injunction as required by the likelihood, in its absence, of future violations. *SEC v. Blatt,* 583 F.2d 1325, 1334 (5th Cir. 1978).

Consent Judgment by the Receiver

Spence next challenges the judgment of September 13, 1976, entered against the company on the basis of the consent decree executed by the receiver. We are , however, unable to discern any ground upon which Spence may predicate for this appeal.

[8] As a general rule a receiver, standing in the shoes of management, hold the sole right—absent some sort of shareholder derivative action—to direct the litigation of the coproration with whose care he is entrusted. *Landy v. Federal Deposit Insurance Corp.*, 486 F.2d, 146-48 (3rd Cir. 1973), *cert. denied*, 416 U.S. 960, 94 S.Ct. 1979, 40L.Ed.2d 312 (1974). This includes the exclusive right to appeal from judgments adverse to the corporation. *See, el. g.,Russell v. Weyand, 5 Cal.App.2d 259, 42 P.2d 381 (1935).* Nothing in the broad grant of power to the receiver appointed to management Spence and Green suggests a deviation from the general rule. Therefore, Spence has no standing, individually, to press a direct appeal.

[9] Spence might, nonetheless, have had appellate standing to dispute the judgment had he been party below to a separate order respecting the validity of the judgment. He has not, however, been a party to any other such appealable order. Spence filed a motion to vacate the consent judgment on September 20, 1976. The trial court declined to rule on the motion, however, because Spence filed his notice of direct appeal before the court could consider the motion to vacate. Accordingly, having found Spence to be without standing to maintain a direct appeal from the consent judgment and not to have been a party to any other appealable order, we dismiss his appeal challenging the company's consent judgment.

Termination of Receivership

On July 1, 1976, Spence moved the court to terminate the receivership under which the company had operated since May 24, 1974. In his report filed January 19, 1977, the receiver, himself, recommended termination—provided the management of Spence and Green was restructured, ending Spenc'es one-man domination, to provide more stable internal financial controls, The SEC agreed to a termination of the receivership on the terms

suggested by the receiver. When Spence rejected this compromise, the court elected to hold his motion to terminate in abeyance pending the outcome of those appeals.

[10-12] The decision whether to remove a receiver is, like the decision to appoint one, an equitable determination resting in the sound discretion of the district court and reviewable only for an abuse of that discretion. *Skirvin v. Mesta,* 141 F.2d 668, 673-74 (10th Cir. 1944). *See, e. g., Bookout v. First National Mortgage & Discount Co.,* 514 F2d 757, 758 (5th Cir. 1975) (per curiam; review of appointment is for abuse of discretion). Nonetheless, the imposition of a receivership on a corporation is a drastic measure, the detrimental business effects of which should be carefully considered. A receivership once imposed on a corporation should be terminated and control returned to those who own the business as soon as the reason for its imposition ceases.

The "temporary" receivership in question has now controlled Spence and Green Chemical Company for almost six years. The receiver reports the company now to be solvent and in fairly stable condition due in part to a working agreement under which Spence and Green is collaborating with the Trumbull Asphalt Division of Owens-Corning Fiberglas Corporation, amicus curiae here, to employ commercially some of its chemical enginering developments. The receiver has indicated that the company will need to issue no new securities during its cooperation with Trumbull Asphalt. Moreover, our affirmance of the permanent injunctions against Spence and the company additionally reduces the probability that Spence will again engage in violations of the securities laws.

[13] We cannot say that the trial court's decision, merely to hold in abeyance pending appeal the motion to terminate the receivership, constituted an abuse of discretion. Nonetheless, under the conditions that presently exist we would respectfully

[1] in particular, in response to the argument that inadequate discovery had occured, the court noted counsel's own failure, despite proddings from Spence's prior attorney, to enter a formal substitution and appearance with the court until April 20, 1976—over six months after his participation began. His not being entered as counsel of record rendered his early discovery requests unacceptable for filing with the court clerk.

suggest that the trial court now exercise that discretion to return unconditional control of the corporation to its owners.

In regard to Spence's remaining points, having examined the record and considered Spence's arguments, we find his contentions attacking the refusal of the trial judge to recuse himself and his claim that curtailment of discovery deprived him of due process to be without merit.

Accordingly, we DISMISS the appeal in our number 76-4017 and otherwise AFFIRM the judgment below.

[2] Section 5(a), (c) of the Securities Act of 1933, 15 U.S.C. § 77e(a), (c), provides:

Section 5. (a) Unless a registration statement is in effect as to a security, it shall e unlawful for any person, directly or indirectly—

(1) to ;make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of anyu prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

• • • • • • • • •

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transporation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statment has been filed as to such security , or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section [8].

[3] Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), provides:

Section 17. (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain mjoney or property ty ;means of any untrue statement of a material fact or anyu omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

[4] Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), provides:

Section 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails or of any facility of any national securities exchange—

• • • • •

(b) To use or employ, in connection with the purchase or sale of any security registered on a natrional securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contraventjion of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[5] Rule 10b-5, 17 C.F.R. § 240.10b-5, provides:
It shall be unlawful for any oaerson, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) to employ any device, scheme, or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c)to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

[6] Spence's misrepresentations and nondisclosures constituted a "practice.... which.... would operate as a fraud or deceit upon the purchaser" proscribed by § 17(a)(3).*Steadman v. SEC,* 603 F.2d 1126, 1133 n.8 (5th Cir. 1979). *Accord SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 198-99, 84 S.Ct. 275, 286, 11 L.Ed.2d 237 (1963).

The proceedings in this case largely transpired fefore the decision in *Ernst & Ernst v.Hochfielder,* 425 U.S. 185, 193, 96 S.Ct. 1375,1380-81, 47 L.Ed.2d 668 (1976), which articulated the requirement of proof of scienter-an intent to deceive, manipulate, or defraud-in private actions under rule 10b-5. Thus, the issue of scienter was not addressed by the district court. This court has, however ruled that proof of scienter is not required for SEC injunctive actions un § 17(a)(2), (3). *Steadman v. SEC,* 603F.2d at 1133.

IN THE
UNITED STATES COURT OF OF APPEALS
FOR THE FIFTH CIRCUIT
Nos. 76-4017, 77-1362, 77-2600, 77-3173

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee

v.

SPENCE AND GREEN CHEMICAL COMPANY, and
ANDREW SPENCE, SENIOR,
Defendants-Appelants

Appeal from the United States District Court,
Southern District of Texas,

Trial Court No. 73-H-998

The Honorable CARL O. BUE., District Judge.

BRIEF FOR AMICUS CURIAE

LYNN N. HUGHES
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Houston, Texas 77027

Attorney for Trumbull
Asphalt Division of
Owens-Corning Fiberglass
Corporation as Amicus Curiae

CERTIFICATE OF INTEREST

Under Local Rule 13(a) of the United States Court of Appeals for the Fifth Circuit, counsel for Trumbull Asphalt Division of Owens-Corning Fiberglas Corporation certifies that the following listed parties have an interest in the outcome of this case.

PARTIES

The Securities and Exchange Commission
Spence and Green Chemical Company
Andrew Spence, Sr.

AMICUS CURIAE

Trumbull Asphalt Division of the Owens-Corning Fiberglas Corporation

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Lynn N. Hughes
Attorney for Amicus Curiae
Trumbull Asphalt Division
Owens-Corning Fiberglas Corporation

ORAL ARGUMENT NOT REQUESTED

The Amicus Curiae does not request oral argument and does not desire to participate should argument be permitted.

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STATEMENT OF THE ISSUE

The District Court abused its discretion in failing to terminate the receivership of defendant company.

STATEMENT OF THE CASE

The plaintiff, Securities and Exchange Commission, filed a complaint against the defendants on July 16, 1973, which was based on alleged violations of the Securities Act of 1933, (Tr. p. 1), and on July 17, 1973, the Commission applied for a temporary injunction and for the appointment of a temporary receiver of the Spence and Green Chemical Company (Tr. p. 17).

The Commission reapplied for the receivership on January 28, 1974, (Tr. p. 22) and Mr. Theo H. Pinson was appointed by the court on May 24, 1974 (Tr. p. 60)

Despite a motion to terminate the receivership, filed on July 1, 1976, (Tr. p. 64), the court declined to rule on them and held them in abeyance pending this appeal in its order of August 17, 1977, (Tr. 0035).

SUMMARY OF ARGUMENT

The receivership is not reasonably related to the securities issues and places a debilitating burden on the defendant company without producing any concomitant benefit to the parties, the shareholders, the creditors, and licensees, or the public.

THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO TERMINATE THE RECEIVERSHIP IT HAD IMPOSED ON SPENCE AND GREEN CHEMICAL COMPANY.

1. The Securities and Exchange Commission (Commission) sought the imposition of the receivership originally on allegations broad and imprecise enough so that it is impossible to ascertain exactly what the agency sought tro achieve through this remedy (Tr. p. 22). Historically the Commission has sought a receivership in three types of cases.

A. In the forty-five years since the passage of the Securities Act, receiverships in aid of the Commission's enforcement efforts have been sought and used in two types of cases: limited receivers for precise, security-related activities and conserving-liquidating receivers.

(1) A relatively innovative remedy requested by the Commission has been the appointment of a receiver for the limited purpose of correcting the misinformation previously supplied to the public by management or of suppling the public with the information that should have been disclosed. S.E.C. v. Koenig, 469 F. 2d 198 (Cir. 1972); Treadway, S.E.C. Enforcement Techniques: Expanding and Exotic Forms of Ancillary Relief, 32 WASHINGTON & LEE LAW REVIEW 637 (1975). This strategy requires the appointment of a limited receiver of brief tenure. S.E.C. v. W. L. Moody & Co., Bank (Uninc.), 374 F. Supp. 465 (S.D. Tex. 1974), affirmed 519 F. 2d 1087 (5th Cir, 1975); S.E.C. v. Beisinger Industries Corp., 552 F. 2d 15 (1st. Cir. 1977). In this case, however, the appointment gives the receiver plenary powers without direction and an indeterminate life, which has already exceeded three and three-quarters years. (Tr. p. 22)

(2) The request for a receiver to aid the Commission in preventing future violations of the securities laws is common, but its use has been

properly limited. Because of its drastic effects, its administrative problems for the court, and its redundance, the receivership as a device to present future violations has been abandoned by most courts in favor of the readily available and effectively potent tools of the injunctions and the contempt powers. S.E.C. v. Petrofunds, Inc., 414 F. Supp. 1191 (S.D.N.Y. 1976).

In the appropriate egregious cases there remains the threat of criminal prosecution. To restrict the use of the scope of the receivership, therefore, does not leave the public or the Commission unarmed, but rather requires that the remedies be specific and tailored precisely to particular evils.

B. The second employment of the receivership remedy has been in those instances where the Commission's complaint is of misapplication of corporate funds to the personal benefit of management individuals. S.E.C. v. U.S. Tank Car Corp., S.E.C. Litig. Rel. Nos. 6512 (Sept. 11, 1974), 6520 (Sept. 17, 1974), and 6573 Nov. 4, 1974). If the management is looting the Company, they must be replaced until new fiduciaries for the owners can be selected. Spence & Green does not present this case; there have been neither allegations nor evidence of any management malfeasance in relation to the shareholders.

C. The third and probably most frequent use of receivership in connection with securities law enforcement cases is when the business, financial, or legal posture is such that the liquidation of the entity is required, which is not the situation with Spence & Green (Tr. p. 60). Even when liquidation is required it is handled under the Bankruptcy Act rather than the Securities Act. Schwarz, Termination of S.E.C. Receiverships in the Federal Courts, 43 FORDHAM LAW REVIEW 163 (1974); S.E.C. v. Arkansas Loan & Thrift Ass'n, 294 F. Supp. 1233 (W.D. Ark. 1969), affirmed sub nom., S.E.C. v. Bartlett, 422 F.2d 475 (8th Cir. 1970).

2. The Commission originally urged the appointment of a receiver at a time when its case against Spence and Green consisted of mere technical violations of the securities laws to which the Commission added allegations that the company was not being run to its satisfaction. This request for a receiver has an overt and a latent thrust.

A. The blanket indictment of mismanagement and the Commission's displeasure at the company's intransigence do not convert this case of alleged registration and reporting requirement failures into the kind of case in which there is a corruption of the management or an absence of a business underlying the alleged securities scheme. Indeed, the court resisted the requests for appointment on the Commission's allegations. The actual appointment came ten months after it was requested and because of the court's reaction to a bank foreclosure action which had no connection with any securities transaction affecting the Commission. That errors of judgment may have been made in the operation of the company does not give rise to the character of mismanagement necessitating or even making appropriate a receiver. The lack of connection between the securities questions and the receiver can be illustrated by the fact that the report of the receiver filed January 19, 1977 (Tr. p. 17), and covering a two-year period, contained only two sentences about security-related management problems (the audit of the stock transfer records).

B. The Commission's zealous pursuit of a receiver and, once having gotten one, tenacious retention of him gives rise to the inference that the burden of the receiver on the cmpany is tactic to force concessions from the defendants; indeed the weight of the protracted litigation added to the suffocation by the receiver can cause the death of the company and loss to the shareholders that the Commission was theorectically concerned with saving. The continuation of a receivership merely to give the Commission an extra bargaining tool improperly

burdens the public, the company, and the shareholders. Treadway, supra; 6 Loss, Securities Regulations 3734 (2d od. Supp. 1969).

3. Implicit in the discussion of the proper role of a Securities Exchange Commission receivership was the contention that the other remedies available to the Commission and to the public make this particular extraordinary, semi-permanent receiver beyond the court's discretion to impose.

A. The government has a full array of effective weapons to meet the problems it sees in the defendant company. The ready availability of injunctions (prohibitory and mandatory), contempt citations, damages, fines, imprisionment, restitution, and other sanctions compels the conclusion that the Commission is not a helpless giant without its receiver.

B. The shareholders, if they deem themselves aggrieved, have their remedies too. The manifold forms of action and kinds of remedy available to the owners of Spence & Green mean that they are not helpless if the Commission and its receiver were no longer. Peterson v. Federated Development Co., 387 F. Supp. 355 (S.D. N.Y. 1974); McLain, Private Remedies Available under Rule 10b-5, 20 S.W.L.J. 620 (1966); Comment: Private Enforcement under Rule 10b-5, 115 U.Pa. L.R. 618 (1967). In the history of this case there is no record of shareholder action having been brought.

4. Is the public interest being secured by the receivership? To the extent that the public is comprised of shareholders, the company, and creditors or licensees of the company the answer is a clear no. To the extent that the public is that larger abstraction whom the Commission serves the answer remains no. There is no threat, no danger, that the receiver serves to thwart; he does not serve even the image of justice.

5. The receiver does not serve any need of the company, which is really the shareholders. Rather than conserve it for them or return it to them, the presence of the receivership has produced an alienation between the owners and the company and a paralysis that affects the vitality of the enterprise. "It is

appreciated that the conservator type of receivership — is not well adapted to a business the very essence of which is promotion..." Los Angeles Trust Deed & Mortgage Exchange v. S.E.C., 285 F. 2d 162 (9th. Cir. 1960), cert. denied, 366 U.S. 919 (1961). The development and exploitation of petro-chemical processes is not a conservative business.

6. Reflecting the judgment of the busines community generally, it has been only with the greatest reluctance that Trumbull has dealt with the company during the pendency of the receivership. "The [receivership] carries connotations which may be ruinous..." S.E.C. v. Bowler, 427 F. 2d 190, at 196 (4thCir. 1970). Only our existing commitment of credit and our faith in the company's processes have compelled us to operate under the hardship of a debtor-licensor in receivership.

7. Since final judgments have been entered in the securities matters (Tr. p. 14, p. 491), it is time to terminate the receivership obtained to aid the Commission's enforcement efforts. The receiver survives the purpose for which he was created, and no new purpose has been proposed.

CONCLUSION

Whatever the merits of the securities law allegations and whatever the propriety of the judgments on those matters, the District Court abused its discretion by failing to terminate a temporary receivership operating ineffectually and inappropriately to the detriment of those whom it was intended to benefit.

Respectfully submitted,

Lynn N. Hughes
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CERTIFICATE OF SERVICE

This is to certify that a copy of the Amicus Curiae Brief has been served on counsel for the Defendants-Appellants and the Plaintiff-Appellee by depositing copies in the United States Mail, postage prepaid, addresed as follows:

Lawrence J. Cohen
53 West Jackson Boulevard
Suit 1305
Chicago, Illinois 60604

James Schapp
Attorney in Charge
Securities and Exchange Commission
515 Rusk Avenue
Houston, Texas 77002

On this the _____day of April, 1978.

Lynn N. Hughes
Howard & Hughes
4605 Post Oak Place, Suite 210
Houston, Texas 77027

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED
FEB. 7, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON, DIVISION

SECURITIES AND EXCHANGE
COMMISSION

vs. CIVIL ACTION NO. 73-H-998

SPENCE & GREEN CHEMICAL
COMPANY, ET AL

ORDER

On January 27, 1975 the Application of Theo W. Pinson, Tempory Receiver for Spence and Green Chemical Company (hereinafter refered to as the Company) came on for hearing before this Court, wherein the Receiver requested approval by the Court of certain acts taken by him as Receiver and requested that the Court approve the settlement of certain litigation of the Company. Spence and Green Chemical Company and Andrew Spence, Sr., defendants herein, were requested by their counsel, J. C. Zbranek. The Temporary Receiver appeared pro se. The Court having heard the testimony of witnesses and other evidence and argument of counsel, it is hereby ORDERED ADJUDGED, and DECREED AS FOLLOWS:

I

The action of the receiver in opening two bank accounts styled "Spence & Green Chemical Company, Theo W. Pinson, Temporary Receiver" and "Spence and Green Chemical Company, Payroll Account, Theo W. Pinson, Temporary Receiver," is hereby approved.

II

The payment of salaries to employee of Spence and Green Chemical Company as set forth in paragraph II of the Application of the Receiver is hereby approved. The agreement by and between Trumbull Asphalt Company and the Receiver, whereby funds advanced and expenses undertaken by Trumbull Asphalt Company on behalf of Spence and Green Chemical Company in connection with the Company's joint development of on-going engineering projects would be considered to be an advance against royalties to Spence & Green Chemical Company from Trumbull Asphalt Company is hereby approved.

III

The pledge of an account receivable of the Company by the Temporary Receiver in order to borrow the sum of $700 from the Astro Bank, as set forth in paragraph III of the Application of the Temporary Receiver, is hereby approved.

IV

The court finds that the defendant Andrew Spence, Sr., is in possession of certain assets of the Company, that is office equipment and typewriters located at a house owned by Andrew Spence at 1407 Runneburg Road, Crosby, Texas, and certain plant and equipment and miscellaneous machinery located on a one-acre tract of land owned by Andrew Spence, situated at the northeast corner formed by the intersection of the Southern Pacific Railway and Ramsey Road, the post office address of which is 11610 Ramsey Road, Crosby, Texas. The court further finds that Andrew Spence, Sr., has failed or refused to give the Receiver complete access and control over the aforementioned assets. It is accordingly ORDERED that Andrew Spence, Sr., deliver to the Temporary Receiver keys to all licks and doors of the aforementioned house at 1407 Runneburg Road and to improvements on the one-acre tract at 11610 Ramsey Road, Crosby, Texas. It is further ORDERED that Andrew Spence, Sr., defendant herein, is enjoined from in limiting the access the Temporary Receiver to the aforementioned one-acre tract or the house at 1407 Runneburg Road so long as any assets of Spence & Green Chemical Company are situated thereon.

V.

The action of the Receiver in returning to the senders in manner set forth in his Application, all securities of Spence & Green Chemical Company mailed to the Company for transfer, is hereby approved.

VI.

The Court heard testimony and other evidence that the Temporary Receiver had incurred expenses totaling $261.40 and that he had been required to expend 142.8 hours of professional time in the discharge of his duties. Expenses in the amount of $261.40 and an interim receiver's fee in the amount of fifty percent of the total hours represented by the time records of the Temporary Receiver at an hourly rate of $50 per hour, for a total of $3,831.40, is hereby approved as a reasonable interim fee.

VII.

The settlement of the case of Wang Engineering vs. Spence & Green Chemical ompany, No. 969033 in the 133rd District Court of Harris County, Texas, wherein Wang Engineering took nothing of Spence & Green Chemical Company by way of damages for unpaid rentals and Spence & Green Chemical Company returned the computer leased by the Company from Wang Engineering, is hereby approved by the Court.

After hearing the testimony of the witnesses, the Court finds that the offer in settlement in the case of Spence & Green Chemical Company vs. First State Bank of Liberty, No. 23866 in the 75th District Court of Liberty County, Texas, whereby First State Bank of Liberty agrees to pay Spence & Green Chemical Company the sum of $25,296.61 is a reasonable offer and the acceptance of this offer in full and final settlement of the said cause number by the Temporary Receiver is hereby approved. The Receiver is hereby directed to issue a release of all claims made in said suit by the Company and to receipt for the funds received in settlement thereof.

ENTERED this _____day of _____,1975.

_____

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

_____

THEO W. PINSON
Temporary Receiver

_____

J. C. ZBRANEK
Attorney for Spence & Green
Chemical Company and
Andrew Spence, Sr.

UNITED STATES OF AMERICA
SECURITIES AND EXCHANGE COMMISSION
ATTESTATION

I HEREBY ATTEST that:

A notification on Form 1-A was filed with this Commission on September 14, 1972 by Spence & Green Chemical Company, pursuant to Regulation A under the Securities Act of 1933, as amended, under File No. 24FW-1555, covering an offering of 104,250 shares of common stock at $2.50 per share; and an order was issued by this Commission on January 11, 1973 temporarily suspending exemption. statement of reasons therefor, and notice of opportunity for hearing.

I further attest that a diligent search has this day been made of the books and records of this Commission, and the books and records do not disclose that any registration statement has ever been filed with this Commission under the name of Spence & Green Chemical Company, pursuant to the provisions of the Securities Act of 1933 as ammended

on file in this Commission

May 31, 1973	CHARLES A MOORE
DATE	DEPUTY RECORDS OFFICER

It is hereby certified that ERNEST L. DESSECKER, Records Officer of Securities and Exchange Commission, Washington, D.C., which Commission was created by the Securities Exchange Act of 1934 (15 USCA Sec. 78a et seg.), is official custodian of the books and records of said Commission in and all books and records created or established by the Federal Trade Commission pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchange Act of 1934, and was such official custodian at the time of executing the above attestation, and that he, and his subordinate, CHARLES A. MOORE, Deputy Records Officer, are authorized to execute the above attestation.

By the Commission

Ronald Hunt
Secretary

Supreme Court of the United States

No. A - 49

ANDREW SPENCE, SR., ET.,AL.,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of petitioner(s), IT IS ORDERED that tthe time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including
October 5, 1980

/s/ Lewis F. Powell, Jr.
Associate Justice of the
Supreme Court of the United States

Dated this 17th
day of July , 1980.

SEPTEMBER 29, 1980

STATE OF TEXAS
COUNTY OF HARRIS AFFIDAVIT

Before me, the undersigned authority, personally came and appeared, JAMES I. FARMER who, after being duly sworn, declared:

That he is the individual who signed a "Consent Degree", on July 27, 1973 relating to the Security & Exchange Commission versus Spence and Green Chemical Company and the events set out and related below are true and correct to his best belief and knowledge.

On July 27, 1973, I signed a "Consent Degree" relating to Spence and Green Chemical Company of Crosby, Texas.

The consent was signed under duress and harassment from Security & Exchange Commission attorneys of Fort Worth and Houston, Texas. The events leading up to this consent are as follows:

1. I received a telephone call from a Mr. Bill T. Walker at home one evening in early July, 1973. I was instructed to attend a meeting at Judge Bue's Chambers the next morning. This was the first I had heard of any problem with the SEC. Mr. Walker identified himself as an SEC attorney.
2. At the meeting the next morning I objected to the general harassment we were receiving and Judge Bue instructed the attending SEC attorneys, James E. Sims and Bill T. Walker, to meet with us and advise us of what was going on.
3. During this meting James E. Sims told me that they were going to put Spence and Green out of business. I questioned him on several points and he requested that we (myself and Andrew Spence) sign a consent degree. We refused and Sims told me he would keep me in the court house until I thought it was home if I didn't.
4. People attending that meeting were Mr. Andrew Spence, Mrs. Andrew Spence, Mr. Joe B. Foster, Mr.

George Lederer, Mr. Jerry Laffingwell, myself and SEC staff, James E. Sims, Bill T. Walker and another SEC employee.

5. I later received several supeonas at my home and office to appear in Court and bring records (that I did not have). I made the appearances but was never called.

6. I was vacationing in Oklahoma City, Oklahoma and received a telephone call from Mr. Joe B. Foster who told me he had been contacted by the SEC attorney Bill T. Walker. They wanted me to sign the consent degree so I could divorce myself from the legal proceeding. I called from Oklahoma City and spoke to Mr. Bill T. Walker. We discussed the problem very briefly and made an appointment to meet when I returned to Houston on July 26, 1973.

7. We met on the morning of July 27, 1973 in the U.S. Court House office of the SEC. Mr. Joe B. Foster was with me and Mr. Bill T. Walker had the same SEC employee with him. Walker continued to threaten me with court action if I did not sign and talked on the telephone to Mr. James E. Sims who said he was in Fort Worth. Mr. Walker restated that the SEC was going to close down Spence and Green Chemical Company and if I did not want to be a party to the SEC action then I had better sign the consent degree which they typed up. I read the consent papers and even though I disagreed with the concept, I signed.

8. I had no attorney, nor did Spence & Green at that time, and from my experience of dealing with government I realized that government attorneys could keep an individual in legal jeopardy for a long time, guilty or innocent. The government can and has financially ruined numerous individuals this way.

9. I immediately resigned as a general director of Spence & Green Chemical Company, retaining my stock ownership and of course the debts on loans the Corporation owed to me.

10. Later, Mr. Spence obtained an attorney to

represent Spence & Green Chemical Company in this SEC action. If the attorney had been available before I "consented" I would not have agreed to the action.
11. I neither confirmed or denied the allegations of the SEC in the consent degree; however, in all other instances, none official, I deny any wrong doing whatsoever in connection with Spence & Green Chemical Company. I have had no contact with Spence & Green since that time except to press for payment on debts owed to me and to write this affidavit at Andrew Spence's request.

J. I. Farmer

SWORN TO & SUBSCRIBED BEFORE ME
THIS 29th DAY OF SEPTEMBER, 1980

Dixie Lee Norris

NOTARY PUBLIC

September 21, 1973

Mr. Andrew Spence, Sr., President
Spence & Green Chemical Company
Post Office Box 356
Crosby, Texas 77532

Dear Andy:

According to our conversation, Trumbull is involved in advancing funds over and above the original contract. The funds are for continued expansion of the Prototype models, working capital for Spence & Green and various and sundry expenses for outside consultants and other related activities.

Your Company has agreed to reimburse Trumbull for these funds advanced upon the start of royalty income from the first units put into operation on a commercial basis. It is also agreed that we would not absorb the entire initial royalties but would reach an agreement based on the conditions as to Trumbull receiving an additional portion of the royalty payments until the advances are satisfied.

Sincerely yours,
Adason M. Miller

Accepted:

_____

Andrew Spence, Sr. President
Spence and Green Chemical Company
Date: 9/21/73

TO WHOM IT MAY CONCERN:

In one of the proceedings in the court of Judge Carl O. Bue, in response to a statement by Mr. Andrew Spence, said that no officer, director, stockholder, or anyone other than the court appointed Receiver, Theo Pinson, would have any say in the management of the Spence & Green Chemical Company affairs. Only the Receiver would have authority to make decisions relative to the business affairs of the company.

The above statement is true and correct to the best of my knowledge.

Donald T. Haydon

Subscribed and sworn to before me on this 26th day of September 1980.

Notary Public for and in
Harris County, Texas

My commission expires:

TO WHOM IT MAY CONCERN:

In a conversation with Mr. Andrew Spence, the date of which eludes me, Mr. Spence was telling me of a near altercation with Theo Pinson resulting from Mr. Pinson's threat to "kick in the door" of a building which Mr. Spence owned, in an attempt to obtain the Minutes Book of Spence & Green Chemical Company.

I told Mr. Spence that I had the book in question.

How the book came into my possession is beyond my recall after the intervening number of years.

Shortly after Mr. Pinson was appointed Receiver for Spence & Green Chemical Company I picked up from his office most of the company records. At that time I signed a receipt for the records given to me by Mr. Pinson. Perhaps a review of this receipt may shed some light on my acquisition of the record book in question.

The above statement is true and correct to the best of my knowledge.

_____

Donald T. Haydon

Subscribed and sworn to before me on this 26th day of September 1980.

_____

Notary Public in and for
Harris County, Texas.

My commission expires:

_____

TO WHOM IT MAY CONCERN:

Some period after the Reagan Bank sale of the Spence & Green Chemical Corp. property and the appointment of Mr. Theo Pinson as Receiver for the company, I received a call from Mr. Spence in Terre Haute, Indiana. He informed me that his wife had called to tell him that trucks, cranes, etc. were at the Ramsey Road plant preparing to move the plant and equipment from the property.

I called Donald M. Wright and he and I drove to Crosby, Texas. The crew which was to remove the units etc. had left.

Mr. Axlerod, one of the group who purchased the property, arrived. He stated that he had bought the plant and equipment as well as the property at the foreclosure sale. Mr Wright informed Mr. Axlerod that this was an incorrect statement. The president of the Reagan Bank had personally informed Mr. Wright that only the land and not the plant and equipment had been sold to satisfy his bank's lien.

I do not recall who alerted Mr. Pinson, the Receiver, but a short time later he arrived at the plant. He sat in the car with Mr. Axlerod and one or more persons for 30 minutes or so. At this time Mr. Axlerod left and Mr. Pinson talked with Mr. Wright and me pointing out what went with the foreclosure sale and what did not.

Such items as the tower and buildings were sold. All outside tanks, the units on the tower, the watercooling tower, boiler, Dowtherm heater, etc. remained the property of Spence & Green Chemical Company.

Mr. Pinson further stated that certain large stainless steel cradles which were in back building could not be removed without tearing out part of the structure housing them would be considered to have gone with the sale. I later learned that the cradles were placed in the structure after it was built therefore they should have been considered as remaining the property of Spence & Green Chemical Company.

The above statement is true and correct to the best of my knowledge.

Donald T. Haydon

Subscribed and sworn to before me on this day 26th day of September 1980.

Notary Public in and for
Harris County, Texas.
My commission expires:
9-30-80

TO WHOM IT MAY CONCERN:

During a court action in Judge Carl O. Bue's court, the Judge ruled that the recommendation of the Receiver, Theo Pinson, pertaining to the settlement of the Liberty Bank suit be accepted. Immediately subsequent to the adjournment of the court, on the sidewalk in from of the Federal Building, Mr. Spence chastised Mr. Zbranek in no uncertain terms for his lack of representation on behalf of his client, Spence & Green Chemical Company, during the hearing.

Mr. Spence informed Mr. Zbranek that he would probably face a malpractice suit. Mr. Zbranek replied that he carried $1,000,000.00 in liability insurance. Mr. Spence's rejoinder was that that amount would be insufficient; it would probably require $2,000,000.00.

Witnesses to the conversation were Kirby Ewing, Donald M. Wright and the undersigned.

Donald T. Haydon

Subscribed and sworn to before me on this 26th day of September 1980.

Notary Public in and for
Harris County, Texas.
My commission expires
9-30-80

J.L. HOOD
CERTIFIED PUBLIC ACCOUNTANT
428 MARTIN DRIVE
HOUSTON, TEXAS 77017

September 6, 1975

The Board of Directors
Spence & Green Chemical Company
Crosby Texas

Gentlemen:

I have examined the accompanying exhibit designated "Spence & Green Chemical Company Stockholders at 8-19-73" for the purpose of determining its reliability as a record of shareholders on that date, including the stock certificate numbers of outstanding capital stock, and the dates of issue thereof. No shares have been issued since August 19, 1973.

My examination included inspection of cancelled and uncancelled stock certificate stubs, cancelled stock certificates, inspection of correspondence originating with various stockholders, confirmation with stock brokers, and tests of the capital stock records to the extent I considered practicable and necessary in the circumstances. My examination did not include determining the corporation's compliance with any stock option plan, or any liability on the part of the corporation for options which may be exercised at a future date.

The results of tests of the uncancelled stock certificate stubs compared with the accompanying exhibit are indicated in summary form as follows:

Size of Sample - 100 percent	Number of shares	Percent of total
Shares of capital stock outstanding as shown on pages 1 1 through 58	1,586,871	100.00
Shares of capital stock outstanding according to uncancelled stock stubs	1,584,119	99.82
Unresolved differences	2,852	.18

Attention is called to certain notations throughout the exhibit indicating information as to shares issued in error, shares owing to from Spence & Green Chemical Company, and instances where current addresses of certain stockholders could not be obtained.

This report does not warrant that discrepancies will not appear under active trading conditions. As a provision for such contingencies, Mr. Andrew Spence, Sr., president of the firm and major stockholder, agrees to make up from his personal holdings of the corporation's common stock, any differences upon which satisfactory showing that the company is in error.

In my opinion, with the exceptions noted above in paragraph 3, and subject to the provision for unresolved differences and contingencies described in paragraph 5, the accompanying exhibit presents fairly the record of issued and outstanding capital stock of Spence & Green Chemical Company as of the close of business on August 19, 1973.

Respectfully submitted,

J.L. Hood